Supreme Court, U.S.
FILED
JUL 21 2000
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No. 99-2043

In The

Supreme Court of the United States

ELDON DUFRENE, et al.,

Petitioners,

v.

BROWNING-FERRIS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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Dated: July 21, 2000

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20 pp

QUESTION PRESENTED

Petitioners were employed by respondent Browning-Ferris, Inc. ("BFI") pursuant to a Collective Bargaining Agreement, which provided that they would be paid a specified sum "per day." A long-standing Interpretive Bulletin of the United States Department of Labor, published at 29 C.F.R. § 778.112, specifies how the overtime compensation required by the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"), is to be calculated for such day-rate employees. The question presented is:

> Whether the FLSA permits an employer to calculate overtime compensation for its day-rate employees according to the formula contained in 29 C.F.R. § 778.112.

RULE 29.6 STATEMENT

Respondent Browning-Ferris, Inc. is a wholly-owned subsidiary of Browning-Ferris Industries, Inc., which is in turn a wholly owned subsidiary of Allied Waste North America, Inc. Allied Waste North America, Inc. is a wholly owned subsidiary of Allied Waste Industries, Inc., which is a publicly held company. Other than Allied Waste Industries' indirect ownership, no publicly held company owns 10% or more of Browning-Ferris, Inc.'s stock.

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STATEMENT

The Petitioners, present or former employees of Respondent Browning-Ferris, Inc. ("BFI"), filed this lawsuit contending that BFI had failed to pay them overtime compensation as required by the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"). The District Court granted BFI summary judgment on Petitioners' overtime compensation claim, Pet. App. 9, and a unanimous panel of the Fifth Circuit affirmed. *Id.* at 1.

Petitioners (hereafter "Workers") and BFI were parties to a Collective Bargaining Agreement, which provided that Workers were to be paid a specified sum "per day," Record on Appeal ("R.A.") 547-48, and that their overtime compensation would be calculated "in accord with the Fair Labor Standards Act, utilizing the fluctuating work week method." R.A. 548-49.

Section 7(a)(1) of the FLSA, 29 U.S.C. § 207(a)(1), provides that an employee is entitled to overtime compensation for hours worked in excess of 40 in any week "at a rate not less than one and one-half times the regular rate at which he is employed." The statute, however, "contains no definition of regular rate of pay and no rule for its determination." *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460 (1948); *see also Condo v. Sysco Corp.*, 1 F.3d 599, 604 n.6 (7th Cir. 1993) ("Although the 'regular rate' is at the heart of § 7(a)(1), the FLSA does not explain how it is computed.").

To fill this gap in the statute, the United States Department of Labor ("DOL") has issued a series of Interpretive Bulletins specifying how the "regular rate" should be calculated in various situations. *See* 29 C.F.R.

Part 778. In particular, the Interpretive Bulletin codified at 29 C.F.R. § 778.112 specifies the manner in which the "regular rate" shall be calculated for employees who are, like Workers, "paid a flat sum for a day's work * * * without regard to the number of hours worked in the day." For such day-rate employees, the "regular rate" "is determined by totaling all the sums received at such day rates * * * in the workweek and dividing by the total hours actually worked." *Id.* The employee "is then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek." *Id.*

In the District Court, the parties stipulated that BFI calculated Workers' overtime pay using the method specified in § 778.112:

> Employees are given their day rate and it is multiplied by the number of days worked [in a week] to determine the amount of compensation due. The total amount of compensation is then divided by the total number of hours worked to derive the hourly [or "regular"] rate. The hourly rate is then divided by 2 and that amount is multiplied by the number of overtime hours. This calculation yields the total amount to be paid in overtime.

Pet. App. 2 (quoting parties' stipulation).

The Collective Bargaining Agreement does not limit the number of hours BFI may require that Workers work in a day; to the contrary, the contract expressly provides that "the sole and exclusive rights of management reserved to the Company * * * include, but are not in any way confined to: the planning of work schedules, including the determination of the number of hours per day or

per week that operations shall be carried on; [and] the assigning of drivers to routes or territories * * * ." R.A. 514; *see also* R.A. 524 ("The Company retains the right to schedule the work and, from time to time, to change the work schedules to meet the varying conditions of the business."). The contract also explicitly recognizes BFI's right to require that employees work overtime. R.A. 529 ("It is recognized that from time to time it may be necessary to work overtime. Any employee qualified to do the work available can be required to work such overtime hours by the Company.").

Although they make neither of these arguments in their Petition, in the courts below Workers primarily attacked BFI's overtime compensation calculations by arguing that the DOL Interpretive Bulletin codified at 29 C.F.R. § 778.112 violates the FLSA, and that Workers should be subject to a separate Interpretive Bulletin (29 C.F.R. § 778.114) applicable to workers paid a weekly salary. Relying largely on *Condo v. Sysco Corp.*, 1 F.3d 499 (7th Cir. 1993), the District Court held that § 778.112 is a permissible agency construction of the FLSA's overtime compensation provisions, since Congress did not define the "regular rate" in the statute, and § 778.112 in fact assures day-rate employees the 50% overtime premium required by § 7(a)(1). Pet. App. 15-17. The court also rejected Workers' argument that they were subject to the DOL Interpretive Bulletin governing employees paid a fixed weekly salary (§ 778.114), since

> [t]he workers do not receive a flat salary per week regardless of how many days of the week they have worked. Instead, they are paid a daily rate, and their weekly salary is computed by

> multiplying the number of days worked by their daily wage.

Pet. App. 19.

Although Workers argued that § 778.112 should be limited to persons employed on a sporadic or seasonal basis, the District Court refused to read any such limitation into the regulation, since "§ 778.112 is not on its face so limited and its language is broad enough to encompass regular employees such as the plaintiffs who are explicitly employed on a daily-rate basis." Pet. App. 20. The District Court noted that its resolution of this issue was consistent with the only prior appellate decision addressing a similar claim. *Id.* (citing *South Fla. Bev. Corp. v. Figueredo*, 409 So.2d 490 (Fla. App. 1981), *cert. denied*, 459 U.S. 881 (1982)).

A unanimous Fifth Circuit panel affirmed. Like the District Court, the Court of Appeals concluded that BFI's overtime compensation calculation fully complied with 29 C.F.R. § 778.112, and that § 778.112 represents "a permissible interpretation of the FLSA, entitled to deference." Pet. App. 6. The appellate court likewise rejected Workers' argument that their overtime pay should be calculated according to the DOL regulation governing employees paid a weekly salary: "[E]mployees here are *not* paid a salary for a workweek. Instead, they are paid for the number of days they work in a week: a day-rate." *Id.* (emphasis original).

REASONS FOR DENYING THE PETITION

Because it satisfies none of the criteria listed in this Court's Rule 10, the Petition for Writ of Certiorari should be denied. The decision below reflects nothing more than a straightforward application of a long-standing, and valid, Department of Labor interpretive regulation. The Court of Appeals' decision is fully consistent with this Court's decision in *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572 (1942), and with the only other appellate decision addressing the same issue. As the dearth of apposite decisions attests, the Question Presented is neither "far reaching" nor "recurring", as the Petition claims. Although the Petition claims BFI unilaterally designated Workers as "day-rate" employees, they were classified that way by a Collective Bargaining Agreement; that agreement also expressly recognizes BFI's prerogative to set work schedules, and require overtime where it deems necessary. Finally, the restrictions Workers ask this Court to impose on freely negotiated compensation arrangements have no basis in any statute or regulation, but would require this Court to fashion wage-and-hour policy from whole cloth, with nothing to guide it but Workers' view of what best furthers the FLSA's humanitarian objectives.

1. Workers first claim that BFI's overtime compensation practice violates this Court's holding in *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572 (1942). Pet. 8-9.

Although it is the centerpiece of their Petition, Workers did not cite the *Missel* decision in their briefs in the Court of Appeals, or argue that BFI's method of

calculating overtime premiums somehow violated the "essential requirements" supposedly erected by *Missel*. By failing to raise the argument below, Workers have waived their new claim that the opinion below conflicts with *Missel*. *United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994); *Granfinanceria, S.A. v. Nordberg*, 492 U.S. 33, 38-40 (1989).

Even if Workers' argument were properly presented, however, the Fifth Circuit's decision is consistent with *Missel*. In that case this Court held that overtime pay for workers paid a flat sum for fluctuating hours should be calculated exactly as BFI did here: divide total weekly compensation by the hours actually worked to derive the "regular rate," and pay an additional 50% of this regular rate for all overtime hours. 316 U.S. at 580 & n.16.

Workers' claim of a conflict rests on a gross mischaracterization of *Missel*'s holding. In that case, an employer paid an employee a flat sum per week, regardless of the hours the employee worked. Although the employee at times worked as many as 80 hours per week, the employer argued that *no* overtime premium pay was required, because the flat weekly salary was large enough that the employee was at all times paid more than the minimum wage for hours up to 40 per week, and more than 150% of the minimum wage for hours worked in excess of 40. *Id.* at 574-75. The Court rejected this argument, holding that the agreed weekly salary represented only "straight-time" compensation, and that, as the FLSA mandated, the employee was entitled to an additional overtime premium equal to 50% of his regular rate for hours worked in excess of 40 per week. *Id.* at 580-81; *see also id.* at 577 ("an intended effect [of the Act] was to

require extra pay for overtime work by those covered by the act *even though their hourly wages exceeded the statutory minimum*"; emphasis added).

Missel's statements that the contract placed "no contractual limit upon the hours which petitioner could have required respondent to work for the agreed wage," and contained "no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage" must be understood against this backdrop – the employer claimed that the employee was not entitled to overtime pay *under any circumstances*. By contrast, the Collective Bargaining Agreement at issue here specifically provided that BFI's day-rate employees would receive additional compensation "in accord with the [FLSA]," over and above their fixed wage, if they worked in excess of 40 hours in a workweek. R.A. 548-49. The Fifth Circuit's endorsement of the parties' collectively bargained pay scheme is perfectly consistent with *Missel*.

Further, *Missel* does not place any absolute limit on the number of overtime hours an employee can be required to work in any week. To the contrary, *Missel* recognized that the FLSA does not prohibit or limit overtime, but instead simply applies "financial pressure" on employers who choose to use overtime work rather than hiring additional personnel. 316 U.S. at 577-78; *see also Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 472 (1948) ("[T]here is no prohibition [in the FLSA] on regular working hours that are longer than the statutory maximum. * * * The statutory maximum hours are significant only as requiring overtime premium pay.").

2. Although Workers do not say so explicitly, their challenge to BFI's calculation of their overtime compensation is necessarily an attack on the validity of the DOL's Interpretive Bulletin, 29 C.F.R. § 778.112. The Petition does not claim that BFI's calculation violates § 778.112; instead, Workers argue that this Court should limit that regulation to persons employed on a seasonal or sporadic basis, and to employees whose work day is limited to a specific number of hours or defined according to the performance of specific tasks.[1] But, as the courts below recognized, no such limits appear in the regulation itself (or, for that matter, in FLSA § 7(a)(1)).[2] If this Court were to grant the Petition and rule in Workers' favor, such a decision would necessarily repudiate the DOL's long-standing interpretation of the FLSA.

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[1] Although not raised in the text of their Petition, Workers' Question Presented also suggests that § 778.112 should not apply to employees who receive fringe benefits beyond their daily wage. Pet. i. But Workers did not make this argument until their Reply Brief in the Court of Appeals, and the Fifth Circuit accordingly held that the argument had been waived. Pet. App. 7. In any event, both the FLSA itself and the DOL's regulations specifically exclude the fringe benefits Workers cite from the calculation of an employee's "regular rate." *See* 29 U.S.C. § 207(e)(2), (e)(4); 29 C.F.R. §§ 778.214, 778.215, 778.218.

[2] The Petition implies that, to comply with § 778.112, an employment contract must define a "day's work," presumably by setting a temporal limit of less than 24 hours on the workday. Pet. 7. But the regulation clearly states that it applies to employees who are "paid a flat sum for a day's work * * * *without regard to the number of hours worked in the day*"; § 778.112 clearly does not require that a "day's work" be limited to a set number of hours.

As the courts below correctly held, *see* Pet. App. 4-6, 15-17, the Department of Labor's interpretation of § 7(a)(1) as it applies to day-rate employees is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). First, as noted above, Congress has not specified in the FLSA how employees' "regular rate" should be calculated.

Second, this Court long ago recognized that, because the Department of Labor administers the FLSA, its interpretations of the Act are entitled to deference. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 580 n.17 (1942).

Third, the Department of Labor's application of § 7(a)(1) to day-rate employees is a permissible construction of the Act. As discussed above, more than 55 years ago, this Court in *Missel* upheld the Administrator's interpretation of § 7(a)(1) in the analogous situation where workers were paid a fixed sum per week, regardless of the total hours worked (now codified in 29 C.F.R. § 778.114). 316 U.S. at 580 & n.16. Since *Missel*, numerous lower-court decisions have held that the "regular rate" for workers paid a fixed sum for fluctuating hours should be calculated as specified in the DOL regulations followed by BFI here: divide the total compensation earned during the week by the hours actually worked, and pay an additional 50% of this "regular rate" for hours in excess of 40. *See, e.g., Valerio v. Putnam Assocs., Inc.*, 173 F.3d 35, 40 & n.3 (1st Cir. 1999); *Roy v. County of Lexington*, 141 F.2d 533, 547 (4th Cir. 1998); *Condo v. Sysco Corp.*, 1 F.3d 599, 605 (7th Cir. 1993); *Blackmon v. Brookshire Grocery*

Co., 835 F.2d 1135, 1138-39 (5th Cir. 1988); *Highlander v. KFC Nat'l Mgmt. Co.*, 805 F.2d 644, 647 (6th Cir. 1986).

3. Workers argue that certiorari is warranted because, under the decisions below, "BFI remains free to unilaterally dictate, increase, and control the number of hours that Workers must labor." Pet. 4. In a similar vein, Workers also repeatedly claim that "*BFI* classified and paid Workers as day rate laborers." Pet. 6 (emphasis added). But this is not a case of employer overreaching or oppression: what Workers conveniently ignore is that they themselves agreed to be paid a fixed sum "per day" in the Collective Bargaining Agreement, and further agreed that their overtime compensation would be calculated according to "the fluctuating work week method." R.A. 547-49. In that collectively bargained agreement, Workers also expressly recognized that the scheduling of work shifts, including the requirement that employees work overtime, was a management prerogative reserved to BFI. R.A. 514, 524, 529. This is *not* a case in which "the employer [had] the sole authority to make each working man and woman in this country * * * a day rate worker," Pet. 12; rather, this is a case in which Workers freely and voluntarily agreed to such an arrangement through their union representatives, and now seek to repudiate the bargain they struck.

4. Workers also complain that "BFI placed no limit upon the hours that BFI can require Workers to labor * * * to earn their 'day rate.' " Pet. 4; *id.* at 8 ("There is no temporal limit on a day * * * ."). It is unclear what legal import Workers attach to the fact that the "per day" compensation to which they agreed is not limited to a

specific number of hours in the day. Workers acknowledged in the Court of Appeals that "[t]he FLSA places no restriction on the number of hours that an employee can work in a day." Brief for Appellant [sic] at 26; *see also Missel*, 316 U.S. at 579 ("the unit of time under [ ] section [7] within which to distinguish regular from overtime is the week"). Since (as Workers concede) the FLSA says nothing about the length of the workday, the fact that the Collective Bargaining Agreement does not limit the hours Workers may be required to work in a day is irrelevant to the question of BFI's compliance with the FLSA.

5. Workers suggest that certiorari should be granted because the Fifth Circuit's decision purportedly conflicts with *Friedrich v. U.S. Computer Services, Inc.*, 833 F. Supp. 470 (E.D. Pa. 1993). Workers identify no appellate decision, state or federal, in purported conflict with the decision below.

Even if the Fifth Circuit's decision conflicted with *Friedrich*, a conflict with a District Court decision does not justify certiorari. And the decisions are not in conflict in any event. In *Friedrich*, "each employee had an annual salary[,] * * * [which] was divided by 52 to determine the employee's weekly salary." *Id.* at 472. Unlike here, the employees in *Friedrich* "received the same pro-rata portion of their annual salaries every two weeks, *regardless of the number of days or hours they worked.*" *Id.* at 474 (emphasis added). In these circumstances, it is hardly surprising that the court determined that § 778.112, which is explicitly limited to employees "paid a flat sum for a day's work," was inapplicable.

Because the workers in *Friedrich* were paid a weekly salary and were therefore clearly not subject to an overtime calculation applicable to day-rate employees, *Friedrich*'s musing that the day-rate regulation "seems to apply" to seasonal workers and independent contractors (833 F. Supp. at 474-75) is pure dictum. (That suggestion is also erroneous, since there is no basis in § 778.112 to justify limiting the regulation in this way.) Even if the Fifth Circuit's decision conflicts with that district-court dictum, certiorari is unwarranted.

What the Petition fails to mention is that the decision below is consistent with the only other appellate court decision addressing the same issue. Like this case, *South Florida Beverage Corp. v. Figueredo*, 409 So.2d 490 (Fla. App. 1981), *cert. denied*, 459 U.S. 881 (1982), involved regular, full-time employees paid a daily rate pursuant to a collective bargaining agreement. Like the courts below, *Figueredo* held that the overtime compensation of these employees was properly calculated according to 29 C.F.R. § 778.112. Notably, even the *Friedrich* court recognized that § 778.112 provided the proper method for calculating overtime for the employees in *Figueredo*, since "[t]he plaintiffs in that case truly were day-rate employees: they received a flat sum for a day's work regardless of the number of hours they worked that day." 833 F. Supp. at 475.

Beyond the lack of a circuit conflict, the fact that the most recent on-point decision is nearly 20 years old shows that the Question Presented is neither "important" nor "recurring"; even if it were erroneous, the Fifth Circuit's application of the FLSA to the relatively unusual

situation of employees paid a flat sum per day does not merit certiorari review.

6. Workers' final argument in favor of granting certiorari is their plea that "[t]here must be boundaries set by the courts to guide employers and employees in identifying the types of employees and the employment circumstances that must exist for an employer to classify and pay its employees as day rate laborers." Pet. 12. But Workers identify no basis in law, apart from this Court's sense of economic justice, from which such "boundaries" could be determined.

The fact is that in enacting the FLSA Congress chose the limited mechanism of simply requiring that employees be paid a premium, based on the "regular rate" to which they and their employers have agreed, for all hours in excess of 40 worked in a particular week; the Act does not prohibit or limit overtime, limit a worker's daily hours, or specify any particular overtime premium wage. And in its Interpretive Bulletins, the Department of Labor has chosen not to impose the limitations on negotiated pay schemes which Workers now advocate. In these circumstances, this Court cannot legislate additional worker protections simply because it believes that doing so might be consistent with Congress' general objectives. *See Director, OWCP v. Newport News Shipbuilding Co.*, 514 U.S. 122, 136 (1995) (principle of liberally construing remedial statutes "does not add features that will achieve the statutory 'purposes' more effectively. Every statute proposes, not only to achieve certain ends, but also to achieve them by particular means * * * ."); *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 157 (7th Cir. 1988) ("To the point that courts could achieve 'more'

of the legislative objectives by [adding provisions to the law], it is enough to respond that statutes have not only ends but also limits.").

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: July 21, 2000